Supreme Court, U. S.
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80-753
No. .....

IN THE

Supreme Court of the United States

October Term, 1980

CHARLES D. MOELLER,

Petitioner,

VS.

DONALD A. BROWNE, BERNARD LUCKART and VICTOR LIBURDI,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

Petitioner was acquitted by a jury of federal charges regarding a conspiracy to commit arson. Subsequent to his acquittal petitioner was recharged by the State of Connecticut with the same conspiracy to commit the same arson. The questions presented for review are:

1. If state and federal interests in prosecuting petitioner are identical, does petitioner's state retrial after a federal acquittal for the same acts constitute a denial of due process?

2. Does the doctrine of collateral estoppel bar relitigation of facts in a state criminal trial which were necessarily adjudicated against the federal government in a prior federal criminal trial?

3. Should *Bartkus* v. *Illinois,* 359 U.S. 121 (1959) be overruled?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinions Below

Petitioner originally moved to dismiss the information against him on May 25, 1977, which motion was denied by the Superior Court of Connecticut in an unreported opinion (App. p. 29A). The Supreme Court of Connecticut affirmed the Superior Court in an opinion reported at 178 Conn. ——, —— A.2d ——, Conn. L. J. Vol. XL, no. 51, p. 20 (June 19, 1979) (Peters, J., dissenting), *cert. denied,* —— U.S. ——, 62 L. Ed. 2d 320 (1980) (App. p. 15A). Petitioner's application for habeas corpus relief was dismissed by the United States District Court, District of Connecticut, in an unreported opinion on June 10, 1980 (App. p. 3A). Thereafter, the United States Court of Appeals affirmed the District Court's dismissal in an unreported opinion on August 20, 1980 (App. p. 1A).

Jurisdiction

The opinion of the United States Court of Appeals for the Second Circuit was entered on August 20, 1980. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Constitutional Provisions and Statutes

U.S. Const., Amend. V:

> "No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . . ."

U.S. Const., Amend. XIV:

> ". . . No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

18 U.S.C. § 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

18 U.S.C. § 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substance (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury. As amended Pub.L. 91-513, Title II, § 701(i) (2), Oct. 27, 1970, 84 Stat. 1282.

Conn. G.S. § 53a-35. Imprisonment for felony: Indeterminate; maximum and minimum sentences

(a) A sentence of imprisonment for a felony shall be an indeterminate sentence, except as provided in subsection (d). When such a sentence is imposed, the court shall impose a maximum term in accordance with the provisions of subsection (b) and the minimum term shall be as provided in subsection (c) or (d).

(b) The maximum term of an indeterminate sentence shall be fixed by the court and specified in the sentence as follows:

(1) For a class A felony, life imprisonment;

(2) for a class B felony, a term not to exceed twenty years;

(3) for a class C felony, a term not to exceed ten years;

(4) for a class D felony, a term not to exceed five years;

(5) for an unclassified felony, a term in accordance with the sentence specified in the section of the general statutes that defines the crime; and

(6) for a capital felony, life imprisonment unless a sentence of death is imposed in accordance with section 53a-46a.

(c) Except as provided in subsection (d) the minimum term of an indeterminate sentence shall be fixed by the court and specified in the sentence as follows:

(1) For a class A felony, the minimum term shall not be less than ten nor more than twenty-five years;

(2) for a class B, C or D felony the court may fix a minimum term of not less than one year nor more than one-half of the maximum term imposed, except that (A) where the maximum is less than three years the minimum term may be more than one-half the maximum term imposed or (B) when a person is found guilty under section 53a-59(a)(1), section 1 of this act,[1] 53a-101(a)(1) or 53a-134(a)(2), the minimum term shall be not less than five years and such sentence shall not be suspended or reduced, or when a person is found guilty under section 3 of public act 77-422,[2] the minimum term shall be not less than three years and such sentence shall not be suspended or reduced, or when a person is found guilty under section 2 of public act 422,[3] the minimum term shall be not less than two years and such sentence shall not be suspended or reduced;

(3) for an unclassified felony, a term in accordance with the sentence specified in the section of the general statutes that defines the crime.

(d) Notwithstanding the provisions of subsections (a) and (c), except as provided in subdivision (2) of said subsection (c), when a person is sentenced for a class C or D felony or for an unclassified felony, the maximum sentence for which does not exceed ten years, the court may impose a definite sentence of imprisonment and fix a term of one year or less; except when a person is found guilty under sections 53a-55, 53a-56a, 53a-60, 53a-70a, 53a-72b, 53a-92a, 53a-94a, 53a-102a and 53a-103a, the court shall not fix a term of less than one year.

(1973, P.A. 73-137, § 8; 1974, P.A. 74-186, § 9, eff. May 13, 1974; 1975, P.A. 75-380, § 14; 1975, P.A. 75-411, § 3; 1976, P.A. 76-435, § 2, eff. June 9, 1976; 1977, P.A. 77-422, § 5.)

Conn. G.S. § 53a-48. Conspiracy. Renunciation as affirmative defense

(a) A person is guilty of conspiracy when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them commits an overt act in pursuance of such conspiracy.

(b) It shall be a defense to a charge of conspiracy that the actor, after conspiring to commit a crime, thwarted the success of the conspiracy, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.

(1969, P.A. 828, §§ 48, 49, eff. Oct. 1, 1971; 1971, P.A. 871, § 16.)

Conn. G.S. § 53a-112. Arson in the second degree. Class C felony

(a) A person is guilty of arson in the second degree when he starts a fire or causes an explosion:

(1) With intent to destroy or damage a building

(a) of another, or

(b) whether his own or another's, to collect insurance for such loss; and

(2) such act subjects another person to a substantial risk of bodily injury or another building to a substantial risk of destruction or damage.

(b) Arson in the second degree is a class C felony.
(1969, P.A.8 28, § 114, eff. Oct. 1, 1971.)

Conn. G.S. §53a-113. Arson in the third degree: Class D felony

(a) A person is guilty of arson in the third degree if he recklessly causes destruction or damage to a building of his own or of another by intentionally starting a fire or causing an explosion.

(b) Arson in the third degree is a class D felony. (1973, P.A. 73-639, § 6.)

Statement of the Case

In May of 1975 petitioner was indicted on four federal charges, including one charge of conspiracy to commit arson in violation of 18 U.S.C. §371, §1952 and Section 53a-113 of the Connecticut General Statutes, in addition to three other charges. After a fourteen week trial, he was acquitted of all charges on January 22, 1976. See, *United States* v. *Bubar*, 567 F.2d 192, n.4 (1980); *State* v. *Moeller*, 178 Conn. ——, —— A.2d ——, Conn. L. J. Vol. XL, no. 51, p. 20 (June 19, 1979) (Peters, J., dissenting), *cert. denied*, —— U.S. ——, 62 L.Ed. 2d 320 (1980). At trial the only disputed issue was whether Mr. Moeller was involved in the plan to commit the arson. Obviously the jury found he was not. Eight of the other individuals in the trial were convicted and were duly sentenced.

On May 3, 1977, Mr. Moeller was charged in Superior Court, Fairfield County at Bridgeport with conspiracy to commit arson in the first and second degrees, in violation of Connecticut General Statutes Annotated §53a-48 (the conspiracy statute) and §53a-111 and 112 (Arson in the First Degree and Arson in the Second Degree). The conspiracy to commit arson in the first degree has now been

voluntarily dropped by the State, and Mr. Moeller now stands charged under a substituted information, alleging only conspiracy to commit arson in the second degree (C.G.S.A. §53a-112).

Petitioner, at his federal trial, faced a maximum sentence of thirty years (five years each for alleged violations of 18 U.S.C. §371 and §1952; and 10 years each for the two alleged violations of 18 U.S.C. §844). At the state trial he faces a maximum imprisonment of five to ten years. See C.G.S.A. §53a-35(c), providing that a minimum term must be set by the Court.

In 1977, Mr. Moeller moved in the Superior Court of the State of Connecticut to dismiss the information on double jeopardy, due process and collateral estoppel grounds. The motion was denied on December 21, 1977 in an unreported decision. The Supreme Court of Connecticut affirmed. *State* v. *Moeller,* 178 Conn. ——, —— A.2d ——, Conn. L. J. Vol. XL, no. 51, p. 20 (June 19, 1979) (Peters, J., dissenting), *cert. denied,* —— U.S. ——, 62 L.Ed.2d 320 (1980). Justice Peters, in dissent, noted that no discernible prosecutorial interest existed in the case, owing to the investigative cooperation between state and federal authorities.

Petitioner then filed an application for a writ of habeas corpus in the United States District Court, District of Connecticut, pursuant to 28 U.S.C. §2254. The writ alleged that a state information filed against petitioner violated his constitutional right not to be put twice in jeopardy for the same offense, denied him his right to due process of law and violated constitutionally-based principles of collateral estoppel, since he had been acquitted of the same charges by a federal jury.

After dismissing the writ in a Memorandum of Decision on May 30, 1980 (filed on June 10, 1980), United States District Court Judge Ellen Bree Burns signed a Certificate of Probable Cause to Appeal. Petitioner duly appealed to the United States Court of Appeals for the Second Circuit and subsequently moved to have this case heard on an expedited basis. The Court of Appeals affirmed the District Court's dismissal.

Reasons for Granting Petition

The Court of Appeals in this case has decided an important question of federal law which has not been but should be settled by this Court; that is, the scope of the due process clause in state criminal prosecutions which follow previous federal trial acquittals for the same acts where the interests of the two sovereigns may be identical. The decision of the Court of Appeals is also in conflict with recent decisions of this Court. Additionally, this Court has not yet considered the doctrine of collateral estoppel in such situations. Petitioner also suggests that this Court reconsider its decision in *Bartkus* v. *Illinois,* 359 U.S. 121 (1959).

A. Decisions of this Court Indicate that In Situations Where the Interests of the State and Federal Governments are Identical, the Due Process Clause Should Bar a State Trial Following a Federal Acquittal for the Same Acts.

In *Bartkus* v. *Illinois,* 359 U.S. 121 (1959) Mr. Justice Frankfurter, speaking for a five Justice majority[1] stated

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[1] Although there were four *Bartkus* dissenters, only Justices Black, Douglas and Warren dissented on due process grounds. Mr. Justice Brennan dissented because he felt the record established that the second state prosecution was federally directed.

that the Fifth Amendment ban on successive prosecutions did not apply to the States. The Court further held that "precedent, experience, and reason alike support the conclusion that Alphonse Bartkus has not been deprived of due process of law." 359 U.S. at 39.

In reaching its decision, the *Bartkus* court examined a number of elements. Initially, the court considered the historical concept of the due process clause:

> (I)t was a flexible concept, responsive to thought and experience—experience which is reflected in a solid body of judicial opinion, all manifesting deep convictions to be unfolded by a process of inclusion and exclusion. *Davidson* v. *New Orleans,* 96 U.S. 97, 104 (1878).

The relevant standard, said the *Bartkus* court, was whether the practice complained of was "repugnant to the conscience of mankind". 359 U.S. at 689, *citing Palko* v. *Connecticut,* 302 U.S. 319, 323 (1937). The *Bartkus* court examined the "balancing" process necessary in applying the due process clause, 359 U.S. at 128, and noted:

> The Anglo-American system of law is based not upon transcendental revelation but upon the conscience of society ascertained as best it may be by a tribunal disciplined for the task and environed by the best safeguards for disinterestedness and detachment.

The Court also examined what it termed a "practical justification" for rejecting Bartkus' plea: that prosecution for a minor federal offense might bar prosecution by a state for a major felony. Justice Frankfurter used the example of *Screws* v. *United States,* 325 U.S. 91 (1945) where the federal crimes carried maximum penalties of one and two years, while the corresponding state crime

was a capital offense. 359 U.S. at 136-37. He also noted that Illinois had an additional interest in *Bartkus;* i.e., that state's habitual offender statute. 359 U.S. at 137 n.25. Bartkus faced a twenty year penalty under federal law; under state law he was sentenced to life imprisonment.

Justice Frankfurter ended his opinion with a brief examination of relevant state statutes and concluded that the task of determining when state administration of justice would not be interfered with was a difficult task. He then concluded that owing to "precedent, reason and experience" there was no violation of due process in Bartkus' case.

In *Benton* v. *Maryland,* 395 U.S. 784 (1969), this court held that the Double Jeopardy Clause of the Fifth Amendment was applicable to the states through the Fourteenth Amendment, overruling *Palko, supra.* (Part of the *Bartkus* holding, of course, was also that the Double Jeopardy Clause of the Fifth Amendment did not apply to the states.)

Mr. Justice Harlan expressed his chagrin at what he perceived to be "a complete overruling of one of this court's truly great decisions". 395 U.S. 808. In this dissent, he stated how he would analyze successive prosecutions under the Due Process Clause:

> The principle that an accused should not be tried twice for the same offense is deeply rooted in Anglo-American law. . . . The Palko court found it unnecessary to decide "(w)hat the answer would have to be if the state were permitted after a trial free from error to try the accused over again or to bring another case against him." 302 U.S. at 328. *However, I have no hesitation in stating that it would be a denial of due process to retry one previously acquitted following an errorless trial.* The idea that the state's interest in convicting wrongdoers is entirely satisfied by

> one fair trial ending in acquittal, and that the accused's interest in repose must thereafter be given precedence, is indubitably a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* at 325.

395 U.S. 810 (emphasis added).

It is difficult to understand why this reasoning does not apply to the case now before the court, at least insofar as the balancing of interests mentioned in *Bartkus* is concerned. Petitioner-Appellant does realize that balanced against the "accused's interest in repose" is the additional interest which one sovereign might have over the other in a particular act. But when those state and federal interests are the same, then the due process balance compels a bar to a second prosecution.

In *Abney* v. *United States,* 431 U.S. 651 (1977), which allowed an appeal of a denial of a motion to dismiss based on double jeopardy grounds to be taken before trial, Chief Justice Burger noted the harm to the individual against which the Double Jeopardy Clause protects:

> (T)his Court has long recognized that the double jeopardy clause protects an individual against more than being subjected to double punishments. It is a guarantee against being twice put to trial for the same offense.

Id. at 661. *Accord, United States* v. *Jorn,* 400 U.S. 470, 479 (1971).

This notion embraces traditional notions of fairness. In *Green* v. *United States,* 355 U.S. 184, 187-88 (1957), Justice Black noted:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is

> that the state with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent, he may be found guilty.

See also, Breed v. *Jones,* 421 U.S. 519, 528-30 (1972).

The ordeal of two trials for a single act extends beyond parameters of the Double Jeopardy Clause. If no purpose is served by a second trial other than a second attempt to convict petitioner, the Due Process Clause should act to bar that second trial.

In *Ashe* v. *Swenson,* 397 U.S. 436 (1970), the Court decided that the Double Jeopardy Clause embraced the doctrine of criminal collateral estoppel. In *Ashe,* the petitioner was charged and tried separately for a single robbery of six men at a poker game. He was acquitted of the robbery of three men, evidently on grounds that he was not a participant. He was convicted of the robbery of a fourth card-player at a subsequent trial. In reversing his conviction, the Court rejected the idea that "fundamental fairness" was the appropriate test to apply in the situation before the court.

The *Ashe* case overruled *Hoag* v. *New Jersey,* 356 U.S. U.S. 464 (1958), a case with facts strikingly similar to those in *Ashe. Hoag* had held (much like *Bartkus*) that the Double Jeopardy Clause did not apply to the states, and, much like *Bartkus,* stated:

> It has long been recognized as the very essence of federalism that the states should have the widest lati-

> tude in the administration of their own systems of criminal justice.

356 U.S. at 467.

The Court also relied on the refusal of numerous state courts to follow the doctrine. *Id.* at 472.

Ashe, reversing *Hoag,* imposed a requirement that the record be examined to determine whether issues which had been determined by the first jury in a defendant's favor would be necessary to show a defendant's guilt at a second trial. But examination of the record in cases decided before *Ashe* under the *Hoag* test was thought to be proper. Petitioner suggests that this examination of the record is also proper pursuant to *Bartkus.*

In the Court of Appeals decision in *Ashe,* 399 F.2d 40 (8th Cir. 1968), Mr. Justice (then Judge) Blackmun expressed his dissatisfaction with the *Hoag* rationale, but felt he was unable to reverse the case owing to the specific holding of the Supreme Court. 399 F.2d at 45. He did, however, in spite of the then "existing fiat" examine the record to determine if due process was violated in the individual case.

The *Ashe* Court of Appeals decision lists seven factors in its affirmance of Ashe's conviction:

1. The continuing viability of *Hoag*;
2. The fact that the Missouri statute in *Ashe* placed emphasis on the individual victim;
3. The criminal action concerned more than a single act of taking;
4. Personal indignities imposed on individual victims were different;
5. The treatment of each robbery as a second crime was not fundamentally unfair;

6. The first acquittal could not be said with certainty to be based on Ashe's identity; and

7. Ashe's was a stronger case for prosecution than Hoag's.

399 F.2d at 45-46.

It should be noted that then Judge Blackmun felt compelled to "carefully read" the transcripts of both trials. Petitioner's suggestion here is that the District Court should have examined the record to determine whether seemingly distinct interests of the state and federal governments are actually the same.

The similarities between *Hoag* and *Bartkus* are striking. Both cases concerned a refusal to extend Fifth Amendment protection to the states; both cases involved double jeopardy related issues; both cases involved a due process rationale; both cases expressed concern for principles of federalism; and both balanced state and individual rights. If an examination regarding fairness was proper under the now demised *Hoag* principles, it is difficult to determine why this is not so under a *Bartkus* rationale.

Cases after *Ashe* also do not disregard a fairness approach. In *United States* v. *Mespoulede*, 597 F.2d 329, 330 (2d Cir. 1979), the United States Court of Appeals for the Second Circuit stated, in a collateral estoppel case, that:

> We believe that once a defendant has satisfied one jury that he is not guilty of a crime, constitutionally-rooted considerations of fairness preclude the government from injecting any issues necessarily decided in his favor into a second trial for another offense.

While *Mespoulede* was based on the Double Jeopardy Clause and this case may not be, petitioner respectfully

asserts that at least similar considerations of fairness apply to him.

This Court in *Bartkus* examined the specific interests of the sovereignties involved. Two recent Supreme Court cases construing *Bartkus* have also examined those interests, strongly indicating that this is a proper way to proceed when faced with a dual sovereignty question. Both decisions examine closely the interests of the two sovereigns present in each case.

In *Rinaldi* v. *United States,* 434 U.S. 22 (1977), the court was faced with a construction of the so-called Petite Policy.[2] Rinaldi had been convicted in state court of robbery under the state statute and was subsequently tried and convicted in federal court under the Hobbs Act after the Assistant United States Attorney had assured the District Court judge that the Petite Policy requirement of authorization by the Justice Department prior to the federal prosecution had been followed. In fact, proper authorization had not been received, and the government, joined by the defendant, moved to dismiss. In holding that the District Court should have granted the motion, the *Rinaldi* court examined *Bartkus* and *Abbate* v. *United States,* 359 U.S. 187 (1959). The Court stated:

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[2] *Petite* v. *United States,* 361 U.S. 529, 530 (1960): "(I)t is the general policy of the Federal Government 'that several offenses arising out of a single transaction should be alleged and tried together and should not be made the basis of multiple prosecutions, a policy dictated by considerations both of fairness to defendants and of efficient and orderly law enforcement.' The Solicitor General on behalf of the Government represents this policy as closely related to that against duplicating federal-state prosecutions, which was formerly defined by the Attorney General of the United States in a memorandum to the United States Attorneys. (Department of Justice Press Release, Apr. 6, 1959.)"

> As these decisions recognize, in our federal system the state and federal governments have legitimate, but *not necessarily identical,* interests in the prosecution of a person for acts made criminal under the laws of both. These cases *reflect the concern that if the Double Jeopardy Clause were applied when the sovereign with the greater interest is not the first to proceed,* the administration of criminal justice may suffer. *Bartkus* v. *Illinois, supra,* at 137; *Abate* v. *United States, supra,* at 195 (emphasis added).

Petitioner-Appellant submits that this view of the concern which *Bartkus* reflects is correct. That is, the recognition that if the interests of the two sovereigns are not identical, the interest in the administration of criminal justice might outweigh the "unfairness that is associated with multiple prosecutions". 434 U.S. at 27. On the other hand, the recognition of the unfairness of multiple prosecutions when both sovereigns have the same interest in prosecuting particular conduct is manifest in the opinion. (It should be noted that the Court described the Petite Policy as useful for the efficient management of limited prosecutorial resources and for encouraging responsibility in local law enforcement. But the court described the protection of the individual from unfairness as "more important" than these two considerations.)

The *Rinaldi* Court noted the Court's concern with the possible unfairness inherent in the power for successive prosecutions. That it did not consider the power of the prosecution to be totally unfettered seems apparent. The Court stated, quoting from *Bartkus*:

> Yet, mindful of the potential for abuse in a rule permitting duplicate prosecutions, the Court noted that

> "(t)he greatest self-restraint is necessary when that federal system yields results with which a court is in little sympathy. *Bartkus* v. *Illinois*, supra, at 138.

434 U.S. at 28.

Thus, *Rinaldi* certainly indicates that some monitoring of successive state-federal prosecutions is necessary. This was further recognized (and the interpretation of *Bartkus* urged herein further validated) when the Court noted that:

> The Petite Policy was designed to limit the exercise of the power to bring successive prosecutions for the same offense to situations comporting with the rationale for the exercise of that power.

434 U.S. at 9.

Thus, this Court apparently stated that some situations do not comport with the rationale for the exercise of the multiple prosecution power. Since that rationale is based on different interests, it appears that some evaluation of those interests is necessary. *Rinaldi* states that the Executive Petite Policy is "not constitutionally mandated". The Court does, however, describe the Petite Policy and "the fundamental constitutional guarantees against double jeopardy" as having parallel purposes, and it would be difficult to argue that an interest analysis of successive prosecutions is simply prohibited by *Bartkus*.

It would be somewhat anomalous if the Supreme Court refused to allow the lower federal courts to share in its "continuing sensitivity to the fairness implications of the multiple prosecution power", 434 U.S. at 28.

In *United States* v. *Wheeler*, 435 U.S. 313 (1978), a unanimous court reaffirmed the *Bartkus* decision in a case

involving the issue of whether successive prosecutions in an Indian tribal court and a United States District Court were prosecutions by the same sovereign. In holding that they were not, the Court analyzed *Bartkus* and *Abbate* in terms of whether the dual prosecutions subject an individual to prosecution for the same offense for double jeopardy purposes, 435 U.S. at 317-18, and in terms of the interests of the different sovereigns, 435 U.S. at 318, n. 8.

Petitioner suggests that the "same offense" test in a dual sovereignty case is a Fifth Amendment *double jeopardy* standard. The Court held that laws of different sovereigns are different offenses. That the *Wheeler* Court also felt obliged to point out the possible differing interests of the two sovereigns is, as has been noted earlier, the relevant *due process* inquiry. The *Wheeler* opinion tracks the order of the *Bartkus* opinion, *i.e.*, first considering double jeopardy grounds and then examining the due process prosecutorial interest.

Petitioner concedes that under *Bartkus* it is apparent that he cannot assert a simple double jeopardy bar to the state court prosecution after his federal acquittal. Petitioner contends, however, that the federal courts are not precluded from considering the fairness implications of his plight.

This is evident from the manner in which the *Wheeler* Court analyzed the problem before it. After noting that the Double Jeopardy Clause did not bar successive prosecutions by different sovereigns (owing to the different offense test mentioned above) the Court proceeded to define the concept of differing sovereignties. The Court held that the test was whether the source of the power to punish was separate or whether it was created by another single gov-

ernmental entity. Since the tribal sovereignty was inherent rather than delegated by the Federal Government, the Indian tribes were held to be separate sovereignties.

If the dual sovereignty/double jeopardy analysis were conclusive of the issue, the *Wheeler* opinion would have ended with the words:

> Since tribal and federal prosecutions are brought by separate sovereigns, they are not "for the same offense", and the Double Jeopardy Clause thus does not bar one when the other has occurred.

435 U.S. at 329-30.

The *Wheeler* opinion, however, adds a section. Section IV of the opinion proceeds to examine the differing interests of the Tribal courts and the Federal Government. The interests appear to be, on the one hand, that major federal crimes might be punished with minor tribal sentences, and on the other hand, the tribal interest in preserving Indian customs. 435 U.S. at 331. The Court specifically pointed to Wheeler who had received a tribal sentence of 75 days and a small fine, but faced a federal sentence of up to 15 years in prison.

If a mere assertion that double jeopardy permits successive prosecutions by different sovereignties is sufficient to preclude court examination of the interests of the sovereigns, then the examination of the interests of the two sovereignties in *Wheeler* would have been unnecessary. If a simple statement that the Double Jeopardy Clause permits a state to prosecute a citizen a second time for an act of which a federal jury has acquitted him suffices the *Rinaldi* Court was wrong in characterizing the existence of differing interests of different sovereignties as the underlying rationale for the existence of the multiple prosecution

power. If the interests of the sovereigns are the same in a given case, then considerations of fundamental fairness necessitate a limit on dual prosecutions in that case.

B. The Doctrine of Collateral Estoppel Should Also Be Held to Bar This Prosecution.

In *Ashe* v. *Swenson,* 397 U.S. 436 (1970), the Court held that the doctrine of collateral estoppel was embodied in the Fifth Amendment's guaranty against Double Jeopardy and that under *Benton* was applicable against the states.

The doctrine was thusly described: "It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe,* 397 U.S. at 443.

The doctrine, being first developed civilly, had been clearly applicable to federal criminal situations, since *United States* v. *Oppenheimer,* 242 U.S. 85 (1916), in which Justice Holmes said: "It cannot be that the safeguard of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt." *Id.* at 87, quoted in *Ashe* at 443.

It was also made clear in *Ashe* that "the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality." *Ashe, supra,* at 444.

The case at bar would be directly governed by *Ashe* if it were not for the fact that there are ostensibly different parties on the prosecutorial side. However, the parties to the lawsuit need not be identical in order that the doctrine be applied with "realism and rationality." For example,

in *Ashe,* Chief Justice Burger noted that the doctrine "ordinarily applies to parties on each side of the litigation who "*have the same interest as* or who are identical with the parties in the initial litigation." *Ashe,* 397 U.S. at 464 (dissenting opinion) (emphasis added).

The notion of identity of parties is also called "privity" of parties in much of the civil discourse on collateral estoppel and res judicata and the *Restatement, Judgments* (1942), in §83, after noting the obvious truth that one in privity is bound, notes in the comment: "The word 'privy' includes those . . . whose interests are represented by a party to the action . . . ."

Once it is noted that the doctrine (a) constitutionally bars relitigation of the same ultimate fact and (b) is properly to be invoked against parties with the same interest in the litigation of that fact or facts, its meaning for this case is clear. The State's interest was identical to and was protected by the federal government in a trial over three months long in which the issue of defendant's conspiring as to this fire was resolved against it.

The claim is brought full circle when one accepts that the double jeopardy protection is intended as a fundamental protection for the individual rather than a prosecution seeking an historically abhorred second bite at the same apple.

C. *Bartkus* v. *Illinois* and Its Dual Sovereignty Doctrine Have Been So Eroded as to Be Without Valid Force.

Bartkus v. *Illinois,* 359 U.S. 121 (1959), in a 5-4 decision, held that an acquittal on a prior federal charge of bank robbery was not a bar to a successive Illinois state prosecution for the same act. The opinion of the bare majority had dual bases, one of which has been specifically and

totally destroyed, while the other has been so eroded as to deserve the same fate.

In the majority opinion, Justice Frankfurter rejected the defense of the Double Jeopardy clause first because of the Fifth Amendment itself was not binding, through lack of incorporation into the Fourteenth Amendment's Due Process clause, against the States. The foundation for said rejected was *Palko* v. *Connecticut,* 302 U.S. 319 (1937), holding that a state prosecution was not prohibited by the Fourteenth Amendment's Due Process clause unless it was "repugnant to the conscience of mankind." [3] The second basis for the *Bartkus* holding was the concept of "dual sovereignty" under which two policy justifications were offered. First, if state prosecutions were barred by prior federal trials, state law enforcement would be hampered. Second, it was stated that the refusal to declare a constitutional bar would permit the states to develop their own "rational and just body of criminal law in the prosecution of its citizens." *Bartkus,* 359 U.S. at 137-38.

The first rationale of *Bartkus,* the inapplicability of the Double Jeopardy clause of the Fifth Amendment, fell with *Benton* v. *Maryland,* 395 U.S. 784 (1969). The Court expressly overruled *Palko,* the strong lynchpin of *Bartkus*:

> ". . . [W]e today find that the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and that it should apply to the States through the Fourteenth Amendment. Insofar as it is inconsistent with this holding, *Palko* v. *Connecticut* is overruled."

Benton, 395 U.S. at 794.

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[3] *Palko,* 302 U.S. at 323, quoted in *Bartkus,* 359 U.S. at 127.

Of that "fundamental ideal," *Benton*, quoting from *Green* v. *United States*, 355 U.S. 184 (1957) said:

> "[T]he underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity as well as enhancing the possibility that even though innocent he may be found guilty." [4]

The lack of viable content remaining in *Bartkus* can be seen by scrutinizing the other basis for its holding, the "dual sovereignty" doctrine. There had been life to dual sovereignty in areas other than the power to successively prosecute and in those areas the rights of the individual have since been held to prevail over what were clearly notions of dual sovereignty, and the abuses formerly permitted in its name.

Prior to 1960, the federal government was free to use evidence illegally seized by State officials, so long as federal authorities did not participate in the illegal activity. *Lustig* v. *United States*, 338 U.S. 74 (1949). The dual sovereignty doctrine inherent in this "silver patter" concept was effectively abolished in *Elkins* v. *United States*, 364 U.S. 206 (1960), where the Court prohibited the introduction of

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[4] *Id.* at 796. Justice Brennan has recently elaborated on the prospect of a second trial enhancing the risk of convicting the innocent, pointing to prosecutorial opportunity to assess weaknesses in the first trial and the frequent occurrence that "prosecution witnesses change their testimony, not always subtly, at second trials." *United States* v. *Scott*, 437 U.S. 82, 105 (1978) (dissenting opinion, n. 4).

illegally seized State evidence in federal courts. ". . . To the victim it matters not whether his constitutional right has been invaded by a federal agent or by a state officer." *Id.* at 215. Additional damage was done to the principle when *Mapp* v. *Ohio*, 367 U.S. 643 (1961) covered the reverse order of events. Evidence seized illegally by federal officials was ruled inadmissible in state prosecutions.

Similarly, notions of dual sovereignty once held sway under the Fifth Amendment's self-incrimination clause. A State court was free to use testimony obtained by the federal government under a grant of federal immunity. *United States* v. *Murdock*, 284 U.S. 141 (1931). The federal government was likewise free to introduce evidence obtained from testimony given before a State grand jury under a grant of State immunity. *Feldman* v. *United States*, 322 U.S. 487 (1944).

However, in *Murphy* v. *Waterfront Commission*, 378 U.S. 52 (1964), the Court, noting the rejection in *Elkins, supra*, of the dual sovereignty doctrine as a reason to allow illegally State-seized evidence in federal courts, ended any prospect for the doctrine of dual sovereignty to justify incrimination in one jurisdiction through immunized compelled testimony in the other. The *Murphy* Court noted that the constitutional policies involved, written to protect the individual, "are defeated when a witness 'can be whipsawed into incriminating himself under both state and federal law even though' the constitutional privilege against self-incrimination is applicable to each." *Murphy, supra*, at 55, quoting Justice Black's dissent in *Knapp* v. *Schweitzer*, 357 U.S. 371, 385 (1958). The same, discredited "whipsaw" remains running smoothly if *Bartkus* continues to permit a second trial by another jurisdiction when each would be prohibited by the Double Jeopardy clause from so acting alone.

The parallels between that which *Elkins* and *Murphy* barred and what petitioner here seeks to enjoin are compelling. Those cases rather clearly destroy the doctrinal foundation of *Bartkus,* by allowing defendants in one jurisdiction to assert their constitutional rights in decrying actions by authority in the other jurisdiction, without having those rights overridden by the abstract concept of dual sovereignty. Both *Elkins* and *Murphy,* unlike *Bartkus,* emphasized the effect upon the individual as did Justice Black's dissent in *Bartkus.* Further, there was expressed a recognition that the two jurisdictions are hardly separate and independent "in our age of 'cooperative federalism,' where the Federal and State Governments are waging a united front against many types of criminal activity." *Murphy,* 378 U.S. at 56.

The *Murphy* Court held that its decision in *Malloy* v. *Hogan,* 378 U.S. 1 (1964), applying the privilege against self-incrimination to the States, compelled reconsideration of the "established rule" that the constitutional privilege did not protect a witness in one jurisdiction against the compulsion to give testimony that could be used to convict him in another jurisdiction. *Murphy,* 378 U.S. at 57. The same consideration obtains here. The Court's decision in *Benton, supra,* enforcing the Double Jeopardy guaranty against the States, necessitates a similar review of the established rule that a federal trial resulting in conviction or acquittal raises no bar to subsequent State trial for the same offense or conduct. As the Court recognized in *Ashe* v. *Swenson,* 397 U.S. 436 (1970), ". . . *Benton* . . . puts the [Double Jeopardy issue] . . . in a perspective quite different from that in which the issues were perceived" when only considerations of Fourteenth Amendment due process were thought pertinent. *Id.* at 442.

By 1966, Justices, Harlan and Stewart, part of the *Bartkus* majority, were of the opinion that *Murphy* had destroyed the notion of dual sovereignty: "In addition, this Court has recently extended the Fifth Amendment to the states, (citing *Malloy*), and abolished the "two sovereignties' rule (citing *Murphy*) . . . ." *Stevens* v. *Marks,* 383 U.S. 234, 250 (1966), (Justice Harlan, whom Justice Stewart joined, concurring in part and dissenting in part). Similarly, regarding the effect of *Benton* on the doctrine, Justice Douglas commented as a Circuit Justice, in 1975 that: "*Benton* may cast doubt upon the continuing vitality of *Bartkus* v. *Illinois,* . . . ." *Smith* v. *United States,* 423 U.S. 1303, 1307 (1975).

Also, *Waller* v. *Florida,* 397 U.S. 387 (1970), saw the Court unanimously reject the State's *Bartkus*-based claim that it was permitted to successively prosecute after a municipal conviction for the same conduct, despite that Florida's argument was constitutional doctrine in at least 21 states. *Id.* at 391, n. 3.

It seems the Court has, since *Bartkus,* remedied those *intra*-trial abuses brought to it regarding evidence (*Elkins*) and testimony (*Murphy*) whereby two sovereigns might have been able to accomplish in concert what neither could do alone. Now the Court is asked to close the circle in response to a constitutional right that addresses the impropriety of the trial itself. Here, as in the post-*Bartkus* cases, the abstraction of federalism and its rather short-lived progeny, dual sovereignty, should not be permitted to totally override a constitutional protection fashioned for the individual.

CONCLUSION

For the reasons stated above, this court should grant certiorari in this case to review the questions presented herein.

Respectfully submitted,

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Certificate of Service

This is to certify that three (3) copies of the foregoing Petition for Writ of Certiorari were mailed, postage prepaid, on this ..... day of ....., 1980, to Counsel for the Respondents, Donald A. Browne, Bernard Luckart and Victor Liburdi: Donald A. Browne, Esquire, State's Attorney, 1061 Main Street, Bridgeport, Connecticut 06604.

RICHARD A. FUCHS

APPENDIX

Appendix "A"

(Order of United States Court of Appeals)

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twentieth day of August, one thousand nine hundred and eighty.

Present:

HONORABLE AMALYA L. KEARSE, *Circuit Judge,*

HONORABLE CALEB R. LAYTON, III, *District Judge,**

HONORABLE EDWARD DUMBAULD, *District Judge.***

80-2181

CHARLES D. MOELLER,

Petitioner-Appellant,

—v.—

DONALD A. BROWNE, et al.,

Respondents-Appellees.

Appeal from the United States District Court for the District of Connecticut.

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* Senior Judge of the United States District Court for the District of Delaware, sitting by designation.

** Senior Judge of the United States District Court for the Western District of Pennsylvania, sitting by designation.

Appendix "A"

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and is hereby is AFFIRMED substantially for the reasons given in the opinion of Judge Burns, dated May 30, 1980.

/s/ AMALYA L. KEARSE
Circuit Judge

/s/ CALEB R. LAYTON, III
District Judge

/s/ EDWARD DUMBAULD
District Judge

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
Filed August 20, 1980
A. Daniel Fusaro, Clerk

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

Appendix "B"

(Judgment of United States District Court)

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil No. B-80-59

CHARLES D. MOELLER

v.

DONALD A. BROWNE, State's Attorney for the Judicial District of Fairfield County; et al.

JUDGMENT

This cause came on for consideration on the defendants' Motions To Dismiss and for Motion For Summary Judgment and/or Motion For Judgment for failure to state a claim upon which relief can be granted by the Honorable Ellen Bree Burns, United States District Judge, and

The Court having considered the defendants' motions and all the papers submitted in connection therewith filed its Memorandum of Decision granting the defendants' motion to dismiss for failure to state a claim upon which relief can be granted as to petitioner's claims of double jeopardy and collateral estoppel and granting the defendants' motions, without prejudice, as to petitioner's claim of federal initiation of the state prosecution,

It is therefore ORDERED and ADJUDGED that judgment be and is hereby entered for the defendants and the petition for a Writ of Habeas Corpus is dismissed.

Appendix "B"

Dated at Bridgeport, Connecticut this 10th day of June, 1980.

SYLVESTER A. MARKOWSKI, Clerk

/s/ KEVIN F. ROWE
KEVIN F. ROWE, Deputy in Charge

Filed June 10, 3:13 P.M., '80
U.S. District Court, Bridgeport, Conn.

Appendix "B"

(Memorandum of Decision of United States District Court)

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil No. B80-59

CHARLES D. MOELLER

v.

DONALD A. BROWNE, State's Attorney for the Judicial District of Fairfield County; BERNARD LUCKART, Clerk of the Superior Court, Judicial District of Fairfield County, and VICTOR LIBURDI, Warden, Community Correctional Center, Bridgeport

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MEMORANDUM OF DECISION

Petitioner has been charged with conspiracy to commit arson in the first degree and conspiracy to commit arson in the second degree in a criminal action pending before the Superior Court in the Judicial District of Fairfield (Connecticut) under an information brought May 3, 1977. On January 22, 1976, petitioner was acquitted in this court of four federal charges, including one alleging conspiracy to commit arson in violation of 18 U.S.C. §371. It is undisputed that the state information centers upon the same alleged conspiracy to commit the same alleged act of arson.

Petitioner has brought this petition for a writ of habeas corpus claiming the state information has been brought in violation of the Double Jeopardy and Due Process

clauses of the Fifth Amendment to the United States Constitution, the Due Process clause of the Fourteenth Amendment thereto, and the doctrine of collateral estoppel. Petitioner further claims that the state prosecution "was federally initiated, designed, investigated and guided in order that a clearly prohibited second federal prosecution might be accomplished indirectly."

Petitioner filed a motion to dismiss the state action in the Superior Court on May 26, 1977, claiming the same Fifth and Fourteenth Amendment violations and violation of Article First, Section 8, of The Connecticut Constitution. This motion was denied in a decision, dated December 21, 1977, which decision was affirmed by the Supreme Court of Connecticut. *State* v. *Moeller,* —— Conn. ——, Conn. L.J., Vol. XL, No. 51, p. 20, June 19, 1979. The United States Supreme Court denied certiorari on November 13, 1979.

Respondents have filed two motions captioned "Motion to dismiss and/or Motion for Summary Judgment and/or Motion for Judgment for failure to state a claim upon which relief can be granted" on the grounds that the law is settled that there can be successive prosecutions by the state and federal governments for conduct violating both state and federal laws and that petitioner has not exhausted his state remedies with respect to the claim that the pending state prosecution was federally initiated.

The leading cases on the constitutionality of successive state and federal prosecutions are *Bartkus* v. *Illinois,* 359 U.S. 121 (1959) and *Abbate* v. *United States,* 359 U.S. 187 (1959). In *Bartkus,* petitioner had been tried and acquitted in a federal district court for violation of 18 U.S.C. §2113, which makes robbery of a federally-insured bank a crime. He was subsequently tried and convicted, on substantially

the same evidence, in an Illinois state court for violation of an Illinois robbery statute. Petitioner's plea of *autrefois acquit* was rejected by the Illinois trial court and, following affirmance of his conviction by the Illinois Supreme Court on an appeal which alleged error in that ruling, *inter alia*, the United States Supreme Court granted certiorari because the petition raised a substantial question concerning the application of the Due Process Clause of the Fourteenth Amendment. After reciting the history of the ratification of the Fourteenth Amendment by the several states, the admission of new states to the union thereafter and the body of case law interpreting the application of the Due Process Clause to state action, and discussing the dual sovereignty theory that it would be "in derogation of our federal system to displace the reserved power of states over state offenses", *Bartkus* at 137, the Supreme Court held that the Due Process Clause does not apply to the states any of the provisions of the first eight amendments as such and that the Illinois prosecution did not violate the Due Process Clause. In *Abbate,* petitioners, following a plea of guilty in an Illinois state court to violation of a state statute making it a crime to conspire to injure or destroy the property of another, were indicted, tried and convicted in a federal district court, because of the same conspiracy, for violating 18 U.S.C. §371 by conspiring to violate 18 U.S.C. §1362, which proscribes the injury or destruction of communications facilities operated or controlled by the United States. The court held the federal prosecution was not barred under the Double Jeopardy Clause of the Fifth Amendment because of the state conviction.

Appendix "B"

Petitioner, however, claims that, as a result of *Benton* v. *Maryland,* 395 U.S. 784 (1968), the viability of *Bartkus* and *Abbate* is subject to serious question. In *Benton,* petitioner had been tried in a Maryland state court for burglary and larceny. Acquitted of the larceny charge but found guilty of burglary, he appealed to the state supreme court which, having recently found a Maryland state constitutional provision requiring jurors to swear their belief in the existence of God unconstitutional, remanded petitioner's case to the trial court where he was given the option of demanding re-indictment and retrial. Petitioner so opted and, at his second trial, he was again charged with larceny and burglary. Petitioner objected to retrial on the larceny charge arguing that, since he had been found not guilty of that charge in his first trial, retrial would violate the double jeopardy provisions of the constitution. This motion was denied and petitioner was retried and convicted of both charges. His double jeopardy claim was rejected on appeal by the Maryland Court of Special Appeals, the Court of Appeals denied discretionary review and the United States Supreme Court granted certiorari. On the merits the latter court held that the Double Jeopardy Clause of the Fifth Amendment is applicable to the states through the Fourteenth Amendment, reversing petitioner's larceny conviction and expressly overruling *Palko* v. *Connecticut,* 302 U.S. 319 (1937), insofar as it was inconsistent therewith.

Petitioner claims that the holding of *Benton,* especially in consideration of the erosion of the dual sovereignty concept inherent in, e.g., *Elkins* v. *United States,* 364 U.S. 206 (1960) (illegally seized state evidence not admissible in federal prosecution), *Mapp* v. *Ohio,* 367 U.S. 643 (1961), (illegally seized federal evidence inadmissible in state pros-

ecution), and *Murphy* v. *Waterfront Commission,* 378 U.S. 52 (1964), (extension of the Fifth Amendment's self-incrimination clause to testimony sought in one jurisdiction that would incriminate in another, absent immunity), should impel this court to finding in the negative on the question of the continuing vitality of *Bartkus.*

Respondents counter by pointing to *United States* v. *Wheeler,* 435 U.S. 313 (1978), in which the court said "In *Bartkus* v. *Illinois,* 359 U.S. 121, and *Abbate* v. *United States,* 359 U.S. 187, this Court reaffirmed the well-established principle that a federal prosecution does not bar a subsequent state prosecution of the same person for the same acts, and a state prosecution does not bar a federal one. The basis for this doctrine is that prosecutions under the laws of separate sovereigns do not, in the language of the Fifth Amendment, 'subject [the defendant] for the same offence to be twice put in jeopardy'." *Wheeler* at 316, 317. Wheeler, a member of the Navajo Indian tribe, pled guilty in a Tribal Court to disorderly conduct and contributing to the delinquency of a minor in violation of the Navajo Tribal Code. A year later an indictment was returned by a grand jury in the United States District Court for the District of Arizona charging him with statutory rape arising from the same incident. Wheeler's motion to dismiss the indictment was granted by the district court which rejected the government's claim that there was no identity of sovereignties between the Navajo Tribal Courts and the United States courts. The Court of Appeals for the Ninth Circuit affirmed the judgment of dismissal on a finding that Indian Tribal Courts and United States District Courts were not arms of separate sovereignties and the Double Jeopardy Clause barred Wheeler's trial. The Supreme Court reversed, finding that the tribe's power to punish *States,* 359 U.S. 187, this court reaffirmed the well-estab-

tribal offenders was a part of inherent tribal sovereignty which had never been relinquished or implicitly lost by reason of the Indians' independent status. "Since tribal and federal prosecutions are brought by separate sovereigns, they are not 'for the same offence,' and the Double Jeopardy Clause thus does not bar one when the other has occurred." *Id.*, 329-330.

Petitioner's argument as to the effect of *Benton* on *Bartkus* and *Abbate* has been considered and rejected by a number of federal appellate courts, e.g., *Hutul* v. *United States*, 582 F.2d 1155 (7th Cir.), *cert. den.* 440 U.S. 911 (1979); *Turley* v. *Wyrick*, 554 F.2d 840, 841 (8th Cir.), *cert. den.* 434 U.S. 1033 (1978); *United States* v. *Frumento*, 563 F.2d 1083, 1088 (3rd Cir.), *cert. den. sub nom. Millhouse* v. *United States*, 434 U.S. 1072 (1978); *United States* v. *Johnson*, 516 F.2d 209, 212 (8th Cir.), *cert. den.* 423 U.S. 859 (1975); *Martin* v. *Rose*, 481 F.2d 658, 659-660 (6th Cir.), *cert. den.* 414 U.S. 876 (1973). Other attacks on the dual sovereignty doctrine have similarly been rejected, e.g., *United States* v. *Hayes*, 589 F.2d 811, 817 (5th Cir.), *cert. den.* 100 S.C. 93 (1979); *United States* v. *Wallace*, 578 F.2d 735, 739 (8th Cir.), *cert. den. sub nom. Mitchell et al.* v. *United States*, 439 U.S. 898 (1978); *United States* v. *Villano*, 529 F.2d 1046, 1060-1061 (10th Cir. 1976), *cert. den.* 426 U.S. 953 (1976); *United States* v. *Vaughan*, 491 F.2d 1096, 1097 (5th Cir. 1974); *United States* v. *Smaldone*, 485 F.2d 1333, 1343 (10th Cir.), *cert. den.* 416 U.S. 936 (1973); *United States* v. *Barone*, 467 F.2d 247, 250 (2d Cir. 1972); *United States* v. *Synnes*, 438 F.2d 764, 773 (8th Cir.), vacated on other grounds 404 U.S. 1009 (1972); *United States* v. *Crosson*, 462 F.2d 96, 103 (9th Cir.), *cert. den.* 409 U.S. 1064 (1972).

Neither petitioner nor the court has found any federal case in which the claim that the death knell has rung on

Bartkus has been accepted.[1] Petitioner points to *People* v. *Cooper*, 398 Mich. 450, 247 N.W. 2d 866 (1976); *Commonwealth* v. *Mills*, 447 Pa. 163, 286 A.2d 638 (1971); and *Commonwealth* v. *Cepulonis*, 373 N.E. 2d 1136 (Supreme Ct. Mass. 1978) in which each of the several states, acknowledging that *Bartkus* allows but does not mandate a successive prosecution, overturned defendants' state convictions by interpreting state constitutional provisions and analyzing the state's interest in prosecution (*Cooper* and *Mills*) and by applying a "same evidence" test *(Cepulonis)*. Some such approach could have been, but was not adopted by Connecticut's highest court (see dissenting opinion of Justice Peters, *State* v. *Moeller*, *supra*, at 23-24) or the Connecticut General Assembly could, by statute, proscribe state prosecutions successive to federal action. This Court, however repugnant may be the concept of successive prosecutions for the same acts, reluctantly concludes that such an option is the state's to exercise in concurrence with the United States Supreme Court's "continuing sensitivity to the fairness implications of the multiple prosecution power," *Rinaldi* v. *United States*, 434 U.S. 22, 28 (1977), and that the weight of authority above cited compels this Court, as it did Judge Lay in *Turley* v. *Wyrick*, *supra*, to acknowledge that "it is not my singular role to express opinion contrary to established law."

Petitioner also argues that the state is collaterally estopped from maintaining this prosecution. In *Ashe* v. *Swenson*, 397 U.S. 436 (1969), the Supreme Court held that the Fifth Amendment guarantee against double jeopardy made applicable to the states in *Benton* v. *Maryland*, *supra*, em-

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[1] Dictum in *United States* v. *Knight*, 509 F.2d 354, 360 (D.C. Cir. 1974), however, suggests that there is "serious question whether the doctrinal line from *Fay* to *Bartkus* has not been eroded by Murphy v. Waterfront Commission, 378 U.S. 52 (1964)."

bodies collateral estoppel, which phrase "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future law-suit." *Ashe* at 443. That doctrine, however, does not aid this defendant because "[c]ollateral estoppel does not apply to successive prosecutions by the state and federal governments because the party that the defendant seeks to estop in the second prosecution was not a party to the first trial." *Turley* v. *Wyrick,* 554 F.2d 840, 842 (8th Cir. 1977), *cert. den.* 434 U.S. 1033, 98 S. Ct. 765, 54 L. Ed. 2d 780 (1978); *United States* v. *Smith,* 446 F.2d 200, 202 (4th Cir. 1971); *United States* v. *Hutul,* 416 F.2d 607, 626 (7th Cir. 1969), *cert. den.* 396 U.S. 1012, 90 S. Ct. 573, 24 L. Ed. 2d 504 (1970)." *United States* v. *Hayes,* 589 F.2d 811, 819 (5th Cir. 1979), *cert. den.* 100 S. Ct. 93 (1979). See also *United States* v. *Feinberg,* 383 F.2d 60, 71 (2d Cir. 1967).

Respondents contend that petitioner's claim that the state prosecution was federally initiated has never been presented to the Supreme Court of Connecticut and that petitioner has not exhausted his existing state remedies. Petitioner's motion to dismiss the information in state court was predicated on the Double Jeopardy and Due Process clauses of the Fifth Amendment, the Due Process and Equal Protection clauses of the Fourteenth Amendment, *Benton* v. *Maryland, supra,* and the Due Process clause of Article First, Section 8, of the Connecticut Constitution. The motion contained no claim that the state prosecution was federally initiated and the decisions of the Connecticut Superior and Supreme Courts did not address this issue. Petitioner did seek the opportunity for hearing and submission of evidence in the state court, an opportunity not afforded to him prior to the issuance of the

Superior Court decision. However, this court's reading of the transcript of oral argument in the Superior Court and petitioner's brief submitted to that court leads to the conclusion that the purpose for the hearing and evidentiary submissions was to show that the "same offence" was being tried in both courts and that there was a mutuality of purpose between the two sovereigns. Nowhere was it suggested that the state prosecution "was federally initiated, designed, investigated and guided in order that a clearly prohibited second federal prosecution might be accomplished indirectly." Petition, ¶3(E). Accordingly, in the view that the Superior Court took of the applicability of the dual sovereignty doctrine it is not surprising no hearing was afforded. Petitioner apparently did not seek reconsideration of its decision by the Superior Court in order to address the hearing issue and no mention is made of the denied hearing opportunity or of the federal initiation claim in his brief to the Supreme Court. Therefore, even assuming this claim was clearly before the Superior Court, it would be considered as having been abandoned on appeal to the Supreme Court. Since 28 U.S.C. §2254 requires that the state's highest court be given an opportunity to pass upon petitioner's claim prior to its consideration on a habeas petition, *Fay* v. *Noia,* 372 U.S. 391, 437-38 (1963); *United States ex rel. Carbone* v. *Manson,* 447 F. Supp. 611, 618 (D. Conn. 1978), this court cannot entertain the allegation that the state prosecution is federally initiated.

Accordingly, respondents' motion to dismiss for failure to state a claim on which relief can be granted is granted as to petitioner's claims of double jeopardy and collateral estoppel and is granted without prejudice for failure to ex-

haust state remedies as to petitioner's claim of federal initiation of the state prosecution.

So Ordered.

/s/ Ellen Bree Burns
Ellen Bree Burns
United States District Judge

Dated at New Haven, Connecticut, this 3rd day of May, 1980.

Filed
May 30 3:52 PM '80
U.S. DISTRICT COURT
NEW HAVEN, CONN.

Appendix "C"

(Decision of Supreme Court)

SUPREME COURT

March Term, 1979

STATE OF CONNECTICUT v. CHARLES MOELLER

COTTER, C. J., LOISELLE, BOGDANSKI, LONGO and PETERS, Js.

Argued March 14—decision released June 19, 1979

Information charging the defendant with the crimes of conspiracy to commit arson in the first degree and conspiracy to commit arson in the second degree, brought to the Superior Court in Fairfield County where the court, *I. Levine, J.*, denied the defendant's motion to dismiss the information, from which the defendant appealed to this court. *No error.*

Thomas L. Nadeau, with whom, on the brief, was *Theodore I. Koskoff,* for the appellant (defendant).

Donald A. Browne, state's attorney, for the appellee (state).

LONGO, J. The single issue presented by this appeal is whether the trial court erred in denying the defendant's motion to dismiss, thus overruling the defendant's claim that a state prosecution, following a federal court jury acquittal regarding essentially the same alleged criminal conduct, would violate certain of the defendant's rights secured by the state and federal constitutions.

We briefly recite those facts necessary to a resolution of this issue: On the evening of March 1, 1975, a fire totally destroyed a large manufacturing facility in Shelton, Connecticut, known as Plant No. 4 of the Sponge Rubber

Products Company. This incident resulted in an extensive investigative effort by both federal and state authorities which led to a federal indictment and the arrest of ten individuals, including the defendant Moeller. Subsequently, a lengthy federal trial resulted in the conviction of various of the federal defendants.[1] On January 22, 1976, the defendant Moeller was acquitted by the federal jury of all of the four charges lodged against him, and on January 27, 1976, a formal judgment of acquittal was rendered by the United States District Court (Newman, J.) as to the defendant. Among the charges upon which the defendant was acquitted was an arson conspiracy count under 18 U.S.C. §§ 371, 1952 and 2.

Thereafter, on May 3, 1977, the defendant was charged in the Superior Court, in a two-count information, with conspiracy to commit arson in the first and second degrees, in violation of §§ 53a-48, 53a-111 and 53a-112 of the General Statutes, for his alleged participation in the Shelton Sponge Rubber Products Company fire. The state's application for a bench warrant, the supporting affidavit, and the subsequently filed information make clear that the same conspiracy as charged in the federal indictment is involved in the pending state prosecution. The defendant pleaded not guilty to the information. On May 25, 1977, the defendant filed a motion to dismiss the information based upon the "double jeopardy" provision of the fifth amendment to the United States constitution,[2] the due process and equal protection clauses of the fourteenth amendment to the constitution, and the due process clause of article first, § 8,

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[1] See *United States* v. *Bubar,* 567 F.2d 192, 196 (2d Cir. 1977).

[2] "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ." U.S. Const. amend. V.

of the Connecticut constitution. On December 21, 1977, the trial court denied the defendant's motion. The defendant has appealed to this court from the denial of his motion to dismiss.

Both the defendant and the state have assisted the court in focusing sharply upon the issue to be resolved; the parties have candidly argued and thoroughly researched the legal principles that must, of necessity, illuminate and guide our decision. The defendant mounts an attack from both constitutional and statutory quarters, arguing that the trial court erred in denying his motion to dismiss, principally because the cases upon which the court relied, *Bartkus* v. *Illinois,* 359 U.S. 121, 79 S. Ct. 676, 3 L. Ed. 2d 684 (1959), and *Abbate* v. *United States,* 359 U.S. 187, 79 S. Ct. 666, 3 L. Ed. 2d 729 (1959), and their numerous progeny, establishing an exception to the rule against double jeopardy commonly referred to as the "doctrine of dual sovereignty," have been so enfeebled and eroded as to lack any binding force. Additionally, it is argued that, consistent with the intention of various legislative enactments and court decisions of other states emphasizing the "individual protection" which the double jeopardy clause was meant to foster, a successive state prosecution following a federal court acquittal is barred. The defendant finally argues that the doctrine of collateral estoppel, as constitutionally embodied in the double jeopardy clause, bars the relitigation by the state of the same operative facts upon which the defendant had previously been acquitted by a federal jury. The state responds that the established law on the issue presented is unequivocal and clear in holding that the same act may constitute a violation of both federal and state laws, and neither a conviction nor an acquittal in federal or state court bars a subsequent prosecution in

the other court system arising from the same transaction or event. We agree.

I

In *Bartkus* v. *Illinois*, 359 U.S. 121, 79 S. Ct. 676, 3 L. Ed. 2d 684 (1959), and *Abbate* v. *United States*, 359 U.S. 187, 79 S. Ct. 666, 3 L. Ed. 2d 729 (1959), the United States Supreme Court reaffirmed the well-established principle that a federal prosecution does not bar a subsequent state prosecution of the same person for the same acts, and a state prosecution does not bar a federal one.[3] The basis for the court's decision, establishing what has been termed the "dual sovereignty" concept; see *United States* v. *Wheeler*, 435 U.S. 313, 98 S. Ct. 1079, 55 L. Ed. 2d 303 (1978); was that prosecutions under the laws of separate sovereigns do not, in the language of the fifth amendment, "subject [the defendant] for the same offense to be twice put in jeopardy": "An offence, in its legal signification, means the transgression of a law. . . . Every citizen of the United States is also a citizen of a State or territory. He may be

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[3] Although the problems arising from concurrent federal and state criminal jurisdiction had been noted earlier; see *Houston* v. *Moore*, 18 U.S. (5 Wheat.) 1, 5 L. Ed. 19 (1820); the court did not clearly address the issue until *Fox* v. *Ohio*, 46 U.S. (5 How.) 410, 12 L. Ed. 213 (1847); *United States* v. *Marigold*, 50 U.S. (9 How.) 560, 13 L. Ed. 257 (1850); and *Moore* v. *Illinois*, 55 U.S. (14 How.) 13, 14 L. Ed. 306 (1852), in the mid-nineteenth century. Those cases upheld the power of states and the federal government to make the same act criminal; in each case the possibility of consecutive state and federal prosecutions was raised as an objection to concurrent jurisdiction, and was rejected by the court on the ground that such multiple prosecutions, if they occurred, would not constitute double jeopardy. The first case in which actual multiple prosecutions were upheld was *United States* v. *Lanza*, 260 U.S. 377, 43 S. Ct. 141, 67 L. Ed. 314 (1922), involving a prosecution for violation of the Volstead Act, c. 85, 41 Stat. 305, after a conviction for criminal violation of liquor laws of the state of Washington.

said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offence or transgression of the laws of both. . . . That either or both may (if they see fit) punish such an offender, cannot be doubted. Yet it cannot be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offenses, for each of which he is justly punishable." *Moore* v. *Illinois,* 55 U.S. (14 How.) 13, 19-20, 14 L. Ed. 306 (1852).

The court in *Abbate* found further support for the "dual sovereignty" concept by noting the "undesirable consequences" that would inhere in imposing a double jeopardy bar upon state-federal or federal-state prosecutions. Prosecution by one sovereign for a minor offense might bar prosecution by the other for a much graver one, and the court clearly took the position that a federal prosecutor has no authority to bargain away a state's power to enforce its criminal laws. See also *United States* v. *Wheeler, supra,* 318.

Finally, *Bartkus* and *Abbate,* although not weathering the years without criticism,[4] rest on the basic structure of our federal system, in which the states and the national government are separate political communities. State and federal governments "[derive] power from different sources," each from the organic law that established it. *United States* v. *Lanza,* 260 U.S. 377, 382, 43 S. Ct. 141, 67 L. Ed. 314 (1922). Each has the power, inherent in any sovereign, independently to determine what shall be an

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[4] See, e.g., Brant, "Overruling *Bartkus* and *Abbate*: A New Standard for Double Jeopardy," 11 Washburn L.J. 188 (1972); Recent Developments, 18 Vill. L. Rev. 491 (1973); Recent Decisions, 12 Duq. L. Rev. 365 (1973); Comment, "Successive Prosecutions by Two Sovereigns After *Benton* v. *Maryland*." 66 Nw. U.L. Rev. 248 (1971); Recent Cases, 39 Cinn. L. Rev. 799 (1970).

offense against its authority and to punish such offenses, and in doing so each "is exercising its own sovereignty, not that of the other." Ibid. "And while the States, as well as the Federal Government, are subject to the overriding requirements of the Federal Constitution, and the Supremacy Clause gives Congress within its sphere the power to enact laws superseding conflicting laws of the States, this degree of federal control over the exercise of state governmental power does not detract from the fact that it is a State's own sovereignty which is the origin of its power." *United States* v. *Wheeler,* supra, 320.

II

The defendant must acknowledge that his claim of double jeopardy, arising from the pending state prosecution, is, as a matter of federal constitutional law, foreclosed under the rationale of *Bartkus* and *Abbate.* It is not correct to claim, however, as does the defendant, that these cases no longer represent the United States Supreme Court's view of the concept of "dual sovereignty," or that these cases have lost their viability concerning successive prosecutions under the double jeopardy clause. The continued validity and propriety of the "dual sovereignty" concept was recognized and affirmed by the unanimous decision of the Supreme Court in *United States* v. *Wheeler,* supra, and has been continuously reaffirmed by the decisions of the United States Court of Appeals. *Wheeler,* holding that the double jeopardy clause did not bar the prosecution of an Indian in a federal court when he had previously been convicted in a tribal court of a lesser included offense arising out of the same incident, discusses *Bartkus* and *Abbate* at length, clearly regarding them as still correctly stating the law, and unequivocally reaffirms the duel sovereignty doctrine which prevents the imposition of the double jeopardy bar.

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Moreover, almost every federal circuit has rejected claims identical to those raised by the defendant Moeller, thereby permitting successive state-federal or federal-state prosecutions. See *United State* v. *Martin,* 574 F.2d 1359 (5th Cir. 1978); *United States* v. *Frumento,* 563 F.2d 1083 (3d Cir. 1977); *United States* v. *Cordova,* 537 F.2d 1073 (9th Cir. 1976); *United States* v. *James,* 532 F.2d 1161 (7th Cir. 1976); *United States* v. *Villano,* 529 F.2d 1046 (10th Cir. 1976); *United States* v. *Johnson,* 516 F.2d 209 (8th Cir. 1975); *Martin* v. *Rose,* 481 F.2d 658 (6th Cir. 1973); *United States* v. *Barone,* 467 F.2d 247 (2d Cir. 1972); *United States* v. *Smith,* 446 F.2d 200 (4th Cir. 1971); *United States* v. *Regan,* 273 F. 727 (1st Cir. 1921).[5]

Notwithstanding this universally accepted principle of federal law, the defendant argues that the principle allowing successive prosecutions has been eroded by three subsequent decisions of the United States Supreme Court, which, it is claimed, suggest that the attitude of the court may have changed since *Bartkus* and *Abbate.* Those decisions are *Benton* v. *Maryland,* 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969); *Waller* v. *Florida,* 397 U.S. 387, 90 S. Ct. 1184, 25 L. Ed. 2d 435 (1970); and *Ashe* v. *Swenson,* 397 U.S. 436, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970). We cannot agree with the defendant's interpretation of those cases. In *Benton* the Supreme Court firmly established that the application of the fifth amendment guarantee against double

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[5] The substantial majority of state courts also adhere to this view. See, e.g., *People* v. *Hines,* 572 P.2d 467 (Colo. 1977); *State* v. *Rogers,* 90 N.M. 604, 566 P.2d 1142 (1977); *State* v. *Forbes,* 348 So. 2d 983 (La. 1977); *Crane* v. *State,* 555 P.2d 845 (Nev. 1976); *Stathes* v. *State,* 29 Md. App. 474, 349 A.2d 254 (1975); *State* v. *Turley,* 518 S.W.2d 207 (Mo. App. 1974); *Klein* v. *Murtagh,* 44 App. Div. 2d 465, 355 N.Y.S.2d 622 (1974); *People* v. *Belcher,* 11 Cal. 3d 91, 520 P.2d 385 (1974); *State* v. *Cooper,* 54 N.J. 330, 255 A.2d 232 (1969); *State* v. *Castonguay,* 240 A.2d 747 (Me. 1968).

jeopardy is enforceable against the states through the fourteenth amendment, but the case has no further application to the case at bar. In *Waller* the court held that a single sovereign, there the state, could not maintain two separate prosecutions for an offense and an included offense. Here, we have independent sovereigns prosecuting for different offenses, each offense being peculiar to the separate sovereign. In *Ashe,* upon a theory of collateral estoppel, it was held that a single sovereign cannot prosecute for separate offenses occurring in a single event where the result of the first prosecution collaterally and undeniably established the innocence of the accused on the second charge. This again, is not our case.[6]

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[6] The defendant argues that the state, pursuant to *Ashe* v. *Swenson,* 397 U.S. 436, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970), is collaterally estopped from "relitigating" the facts upon which he was acquitted in federal court. We disagree. Collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the *same parties* in any future law suit." (Emphasis added.) *Ashe* v. *Swenson,* supra, 443; see *Slattery* v. *Maykut,* Conn. (40 Conn. L.J., No. 12, pp. 4, 7) (1978). The application of collateral estoppel thus requires an identity of parties in the prior and subsequent litigation. In this case, the federal government is neither the same as nor in privity with the state of Connecticut. In such circumstances, the state is not collaterally estopped from maintaining a prosecution against the defendant. *Turley* v. *Wyrick,* 554 F.2d 840, 842 (8th Cir. 1977); *United States* v. *Johnson,* 516 F.2d 209, 211 (8th Cir. 1975); *Martin* v. *Rose,* 481 F.2d 658, 660 (6th Cir.), cert. denied, 414 U.S. 876, 94 S. Ct. 86, 38 L. Ed. 2d 121 (1973); *Ferina* v. *United States,* 340 F.2d 837, 839 (8th Cir.), cert. denied, 381 U.S. 902, 85 S. Ct. 1446, 14 L. Ed. 2d 284 (1965); *United States* v. *Wapnick,* 315 F.2d 96 (2d Cir. 1963); *Rios* v. *United States,* 256 F.2d 173 (9th Cir. 1958); *State* v. *Smith,* 359 So. 2d 160, 163 (La. 1978); *State* v. *West,* 260 N.W.2d 215, 219 (S.D. 1977); *State* v. *Rogers,* 90 N.M. 604, 607, 566 P.2d 1142 (1977); *Commonwealth* v. *Studebaker,* 362 A.2d 336 (Pa. Super. 1976); *Klein* v. *Murtagh,* 44 App. Div. 2d 465, 469, 355 N.Y.S.2d 622 (1974).

We thus decline the defendant's invitation to construe *Benton, Waller* and *Ashe* as cases anticipatory of a rule prohibiting all but a single prosecution regardless of considerations concerning different laws and the rights of separate sovereigns. The courts that have considered the precise claim made by the defendant concerning the effect of these cases on *Bartkus* and *Abbate* have specifically rejected the argument. *Hutul* v. *United States,* 582 F.2d 1155, 1157 (7th Cir. 1978); *United States* v. *Wallace,* 578 F.2d 735 (8th Cir. 1978); *United States* v. *Johnson,* 516 F.2d 209 (8th Cir. 1975); *Martin* v. *Rose,* 481 F.2d 658 (6th Cir. 1973); *United States* v. *Crosson,* 462 F.2d 96 (9th Cir. 1972); *United States* v. *Synnes,* 438 F.2d 764 (8th Cir. 1971); *State* v. *Fletcher,* 26 Ohio St. 2d 221, 224, 271 N.E.2d 567 (1971); *Breedlove* v. *State,* 470 S.W.2d 880, 882 (Tex. Crim. App. 1971); *Bankston* v. *State,* 236 So. 2d 757, 760 (Miss. 1970); *State ex rel. Cullen* v. *Ceci,* 45 Wis. 2d 432, 457, 173 N.W.2d 175 (1970). A compilation of additional cases in accord with those cited may be found in annot., 18 A.L.R. Fed. 393.

Furthermore, the defendant's argument that the United States Supreme Court may have "changed its mind" concerning *Bartkus* and *Abbate* is, at the least, not aided by the fact that that court has consistently denied review, most recently on February 20, 1979, without a single dissent, in appeals involving precisely the same multifaceted attack made by the present defendant challenging the continuing authority of *Bartkus* and *Abbate.* See *Hutul* v. *United States,* 582 F.2d 1155 (7th Cir.), cert. denied, —— U.S. ——, 98 S. Ct. 1222, — L. Ed. 2d —— (1979) (leaving intact ruling that no double jeopardy violation inheres in successive prosecutions); *MacDonald* v. *United States,* 585 F.2d 1211 (4th Cir. 1978), cert. denied, —— U.S. ——, 99 S. Ct. 1504, —— L. Ed. 2d —— (1979) (leaving intact ruling that

collateral estoppel no bar to successive prosecution); *Parker* v. *United States,* 582 F.2d 953 (5th Cir. 1978), cert. denied, —— U.S. ——, 99 S. Ct. 1424, —— L. Ed. 2d —— (1979) (leaving intact ruling that collateral estoppel no bar to successive prosecution.[7]

III

The defendant finally assigns significant emphasis to the decisions of some state courts,[8] and a number of legislative enactments, that have, pursuant to particular state constitutions or by statute, limited or rejected the dual sovereignty concept.[9] We are not persuaded to join those states in rejecting the clear language of the United States Supreme Court in *Bartkus* and *Abbate,* and the almost uni-

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[7] See also *Millhouse* v. *United States,* 563 F.2d 1083 (3d Cir. 1977), cert. denied, 434 U.S. 1072, 98 S. Ct. 1256, 55 L. Ed. 2d 775 (1978); *Sills* v. *United States,* 563 F.2d 1083 (3d Cir. 1977), cert. denied, 434 U.S. 1072, 98 S. Ct. 1258, 55 L. Ed. 2d 776 (1978); *United Sttaes* v. *Kerrigan,* 514 F.2d 35 (9th Cir. 1975), cert. denied, 423 U.S. 924, 96 S. Ct. 266, 46 L. Ed. 2d 249 (1975); *United States* v. *Kerrigan,* 514 F.2d 35 (9th Cir. 1975), cert. denied, 420 U.S. 964, 95 S. Ct. 1358, 43 L. Ed. 2d 443 (1975); *United States* v. *Burke,* 495 F.2d 1226 (5th Cir. 1974), cert. denied, 419 U.S. 1079, 95 S. Ct. 667, 42 L. Ed. 2d 673 (1974); *Martin* v. *Rose,* 481 F.2d 658 (6th Cir. 1973), cert. denied, 414 U.S. 876, 94 S. Ct. 86, 38 L. Ed. 2d 121 (1973).

[8] *State* v. *Hogg,* N.H. , 385 A.2d 844 (1978); *People* v. *Cooper,* 398 Mich. 450, 247 N.W.2d 866 (1976); *Commonwealth* v. *Mills,* 447 Pa. 163, 286 A.2d 638 (1971); cf. *Commonwealth* v. *Cepulonis,* Mass. , 373 N.E.2d 1136 (1978).

[9] Alaska, Arizona, Arkansas, California, Delaware, Georgia, Hawaii, Illinois, Indiana, Kansas, Minnesota, Montana, New York, North Dakota, Oklahoma, Pennsylvania, Utah, Virginia, and Washington have such legislation. See citations collected at American Law Institute, Double Jeopardy, 126-27 (1935), and Model Penal Code § 1.11, pp. 60-61, comment (Tent. Draft No. 5, 1956).

versal acceptance of those authorities in the cases we have cited in this opinion. Our constitution, first, has no double jeopardy clause, and although we have indicated that the prohibition against double jeopardy is implicit in our common law; *State* v. *Woodruff*, 2 Day 504, 507 (1807); we have never held that, under the circumstances of this case, a state prosecution is barred. We refrain from doing so in the present case. A contrary rule could result in an unseemly race between the federal and state authorities to obtain early jurisdiction, thereby eventuating in a frustration of either the national or state policy concerning law enforcement. To agree with the defendant could create an "undesirable result"; *Abbate* v. *United States,* supra, 195; "the result would be a shocking and untoward deprivation of the historic right and obligation of the states to maintain peace and order within their confines." *Bartkus* v. *Illinois,* supra, 137.

The dual sovereignty concept of *Bartkus* and *Abbate* is based upon the practical necessity of permitting the state and federal governments to enforce laws which they enact in their respective fields of operation. Those decisions, giving sensible recognition to the practicalities of our constitutional form of government, reject the premise that successive prosecutions are merely a judicial nuance, and compellingly find that the necessities of the governments in enforcing their laws for the benefit of *all* citizens are of greater importance than the undesirability of an occasional imposition of two trials on an individual. We agree.

There is no error.

In this opinion COTTER, C. J., LOISELLE and BOGDANSKI, JS., concurred.

Appendix "C"

PETERS, J. (dissenting). While I agree with my colleagues that *Bartkus* v. *Illinois,* 359 U.S. 121, 79 S. Ct. 676, 3 L. Ed. 2d 684 (1959), and *Abbate* v. *United States,* 359 U.S. 187, 79 S. Ct. 666, 3 L. Ed. 2d 729 (1959), established a rule of dual sovereignty that has continued to have vitality, I disagree about the implications of dual sovereignty for this court.

Dual sovereignty is one example of the recognition of the principles of federalism. *Bartkus* and *Abbate* hold no more than that the fourteenth and the fifth amendments to the United States constitution do not forbid one sovereign the right to reprosecute a criminal defendant because of his prior involvement with the other sovereign. Nothing in those cases compels, or even legitimates, automatic reprosecution as a matter of state law. That the rule of dual sovereignty is permissive rather than mandatory is clear from *Bartkus,* the case more directly relevant because it too involved state reprosecution after federal acquittal. *Bartkus* stated (pp. 138-39): "[T]hese problems are ones with which the States are obviously more competent to deal than is this Court. Furthermore, the rules resulting will intimately affect the efforts of a State to develop a rational and just body of criminal law in the protection of its citizens. We ought not to utilize the Fourteenth Amendment to interfere with this development."

It is furthermore clear that the formal absence of a provision in our constitution expressly forbidding double jeopardy is not a barrier to consideration of the claim raised by the defendant. The prohibition against double jeopardy is, as my colleagues acknowledge, implicit in the common law and our cases have so held. *State* v. *Langley,* 156 Conn. 59, 600-601, 244 A.2d 366 (1968), cert. denied 393 U.S. 1069, 89 S. Ct. 726, 21 L. Ed. 2d 712 (1969); *Kohlfuss* v. *Warden,*

149 Conn. 692, 695, 183 A.2d 626, cert. denied, 371 U.S. 928, 83 S. Ct. 298, 9 L. Ed. 2d 235 (1962). This case comes to us as a matter of first impression as to which there are no binding precedents until today.

The facts of the case before us present a compelling argument for invocation of the prohibition against double jeopardy. The defendant is charged in this state with the same conspiracy for which he was indicted and acquitted in federal court. The incident that gave rise to both prosecutions was, from the outset, investigated jointly by federal and state authorities. There is no discernible prosecutorial interest that was not fully vindicated in the original federal trial. The state has made no affirmative showing why this defendant should twice be forced to run the gauntlet of criminal prosecution.

I believe this court should adopt the view of the Model Penal Code § 1.10 (Proposed Official Draft, 1962) barring reprosecution after acquittal in another jurisdiction unless "the offense of which the defendant was formerly . . . acquitted and the offense for which he is subsequently prosecuted each requires proof of a fact not required by the other and the law defining each of such offenses is intended to prevent a substantially different harm or evil . . . ." This position has recently been accepted by a number of state courts; *Commonwealth* v. *Cepulonis,* Mass. , 373 N.E.2d 1136, 1141-42 (1978); *People* v. *Cooper,* 398 Mich. 450, 460-61, 247 N.W.2d 866 (1976); *State* v. *Hogg,* N.H. , 385 A.2d 844, 846-47 (1978); *Commonwealth* v. *Mills,* 447 Pa. 163, 169-72, 286 A.2d 638 (1971).[1]

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[1] The Final Report of the National Commission on Reform of Federal Criminal Laws ("The Brown Commission") in 1971 recommended the enactment of federal legislation to modify *Bartkus* and *Abbate.* See Report on Proposed Federal Criminal Code, 34 Busi-

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It is unarguable that the instant reprosecution cannot meet the test proposed by the Model Penal Code.

My colleagues fear that a limitation on state authority to reprosecute could result in an unseemly race between the federal and the state authorities to obtain early jurisdiction. It seems to me at least as likely that the state and federal authorities will, as in the case before us, cooperate to assure two functionally identical opportunities to try a defendant more than once for one and the same offense. Unless there is a substantial independent state interest to be vindicated, scarce state prosecutorial resources might better be allocated to trying new crimes rather than to retrying old ones.

I would, therefore, find error on the part of the trial court.

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ness Lawyer 725, 730 and 753 (January 1979). The American Bar Association's Study Committee urges amendment of S. 1437, the proposed Criminal Code Reform Act of 1978, to incorporate the proposals of the Brown Commission. Id., 754.

Appendix "D"

(Opinion of Trial Court)

SUPERIOR COURT

COUNTY OF FAIRFIELD

No. 25,131

December 21, 1977

STATE OF CONNECTICUT

vs.

CHARLES D. MOELLER

MEMORANDUM ON DEFENDANT'S MOTION TO DISMISS INFORMATION BASED ON DOUBLE JEOPARDY

The defendant has moved to dismiss the information pursuant to the double jeopardy clause of the Fifth Amendment and the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States and Article First, Section 8, of the Connecticut Constitution. His motion alleges that the defendant was indicted and tried in the United States District Court in New Haven, Connecticut, and that the federal crimes alleged and tried arose out of the same transaction and occurrence as provides the basis for this action. He further alleges that the jury returned a verdict of not guilty on the charges submitted to it after other charges had been dismissed by he court or withdrawn by the government. He further alleges that the crimes charged by the federal and state governments do not reflect that the interests of

the federal and state governments are substantially different nor the penalties widely disparate, nor the statutes substantively different, and that there is no "reason to believe that the federal government could not have been trusted to fully vindicate the interest of the State government."

The landmark cases in the area of double jeopardy, i.e., successive prosecutions by the federal and state governments, are *Bartkus* v. *Illinois,* 359 U.S. 121, 79 S.Ct. 676, 3 L.Ed.2d 684, and *Abbate* v. *United States,* 359 U.S. 187, 79 S.Ct. 666, 3 L.Ed.2d 729, which held that the due process clause of the Fourteenth Amendment does not prohibit prosecutions by both sovereignties for federal and state crimes arising out of the same transaction or occurrence and that they exercise concurrent jurisdiction over the same offense. This doctrine has been followed in many cited decisions. *Goode* v. *McCune,* 543 F.2d 751, 753 (1976); *United States* v. *Cordova,* 537 F.2d 1073, 1075 (1976); *United States* v. *James,* 532 F.2d 1161, 1165 (1976); *United States* v. *Villano,* 529 F.2d 1046, 1061 (1976); *United States* v. *Jones,* 527 F.2d 817, 822 (1975); *Sappington* v. *United States,* 523 F.2d 858, 860 (1975); *Speed* v. *United States,* 518 F.2d 75, 76 (1975); *United States* v. *Johnson,* 516 F.2d 209, 212 (1975); *United States* v. *Kerrigan,* 514 F.2d 35, 37 (1975), cert. den. 423 U.S. 924, 96 S.Ct. 266, 46 L.Ed.2d 249; *United States* v. *Worth,* 505 F.2d 1206, 1210 (1974), cert. den. 420 U.S. 964, 95 S.Ct. 1358, 43 L.Ed.2d 443; *United States* v. *Watts,* 505 F.2d 951, 953 (1974); *United States* v. *Ackerson,* 502 F.2d 300, 302 (1974); *United States* v. *Delay,* 500 F.2d 1361, 1362 (1974); *Brinlee* v. *United States,* 496 F.2d 351, 353 (1974); *United States* v. *Burke,* 495 F.2d 1226, 1235 (1974), cert. den. 419 U.S. 1079, 95 S.Ct. 667, 42 L.Ed.2d 673; *United States* v. *Hayles,* 492 F.2d 125,

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126 (1974); *United States* v. *Vaughan, Jr.*, 491 F.2d 1096, 1097 (1974); *People* v. *Belcher*, 113 Cal.Rep. 1, 520 P.2d 385, 389 (1974); *United States* v. *Smaldone*, 485 F.2d 1333, 1343 (1973); *Martin* v. *Rose*, 481 F.2d 658, 659 (1973), cert. den. 414 U.S. 876, 94 S.Ct. 86, 38 L.Ed.2d 121; *United States* v. *Addington*, 471 F.2d 560, 566 (1973); *United States* v. *Jackson*, 470 F.2d 684, 689 (1972) cert. den. 412 U.S. 951, 93 S.Ct. 3019, 37 L.Ed.2d 1004; *United States* v. *Barone*, 467 F.2d 247, 250 (1972); *United States* v. *Crosson*, 462 F.2d 96, 103 (1972); *United States ex rel. Hill* v. *United States*, 452 F.2d 664, 665 (1971); *Birch* v. *United Statts*, 451 F.2d 165, 167 (1971); *United States* v. *Smith*, 446 F.2d 200, 202 (1971); *United States* v. *Synnes*, 438 F.2d 764, 773 (1971); *United States* v. *Hutul*, 416 F.2d 607, 626 (1970), cert. den. 396 U.S. 1012, 90 S.Ct. 573, 24 L.Ed.2d 504; *DeMaria* v. *Jones*, 416 F.Supp. 291, 301 (1976); *Turley* v. *Wyrick*, 415 F.Supp. 87, 88 (1976); *Lovell* v. *Arnold*, 391 F.Supp. 1047, 1048 (1975); *Crane* v. *State* (Nev.), 555 P.2d 845, 846 (1976); *State* v. *Turley*, (Mo.) 518 S.W.2d 207, 209 (1975); *Sathes* v. *State*, 29 Md.App. 474, 349 A.2d 254 (1975); *Office of Disciplinary Counsel* v. *Campbell*, (Penn.) 345 A.2d 616, 620 (1975); *Klein* v. *Murtagh*, 355 N.Y.S.2d 622, 626, 44 A.D.2d 465 (1974); *Bell* v. *State*, 22 Md.App. 496, 323 A.2d 677 (1974), cert. den. 421 U.S. 1003, 95 S.Ct. 2405, 44 L.Ed. 2d 671; *State* v. *Glover* (Mo.), 500 S.W.2d 271 (1973); *State* v. *Krell*, 125 N.J.Super. 457, 311 A.2d 399, 401 (1973); *State* v. *Pope*, 186 Neb. 489, 184 N.W.2d 395, 396 (1971); *Nance* v. *State*, 123 Ga.App. 410, 181 S.E.2d 295, 296 (1971); *Breedlove* v. *State*, (Tex. Cr.App.), 470 S.W.2d 880, 882 (1971), cert. den. 405 U.S. 1074, 92 S.Ct. 1512, 31 L.Ed.2d 808; *State* v. *Fletcher*, 26 Ohio St. 2d 551, 271 N.E.2d 567, 569 (1971), cert. den. 404 U.S. 1024, 92 S.Ct. 699, 30 L.Ed.2d 675; *State ex rel. Cullen* v. *Ceci*, 45 Wis.2d 432, 173 N.W.2d 175, 187

(1970); *Coffman* v. *State* (Tenn.), 466 S.W.2d 241, 243 (1970), cert. den. 404 U.S. 1019, 92 S.Ct. 689, 30 L.Ed.2d 668; *Bankston* v. *State* (Miss.), 236 So.2d 757, 760 (1970); *State* v. *Cooper,* 54 N.J. 330, 255 A.2d 232, 236 (1969); *State* v. *Castonguay* (Me.), 240 A.2d 747, 750 (1968); *Lem* v. *Commonwealth* (Ky.), 419 S.W.2d 759, 761 (1967).

The defendant's argument is based on the law stated in *Benton* v. *Maryland,* 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707; and *Ashe* v. *Swenson,* 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469. Essentially his argument is that these decisions, as well as many other cases cited by him, have weakened *Bartkus* to the point where it should no longer be followed. He points to no case which overrules *Bartkus.* Sustaining the viability of *Bartkus* in cases making the same claims as the defendant makes here are the following: *United States* v. *Villano,* 529 F.2d 1046, 1061 (1976); *United States* v. *Johnson,* 516 F.2d 209, 212 (1975); *United States* v. *Hayles,* 492 F.2d 125, 126 (1974); *United States* v. *Vaughan, Jr.,* 491 F.2d 1096, 1097 (1974); *United States* v. *Smaldone,* 485 F.2d 1333, 1343 (1973); *Martin* v. *Rose,* 481 F.2d 658, 659 (1973), cert. den. 414 U.S. 876, 94 S.Ct. 86, 38 L.Ed.2d 121; *United States* v. *Crosson,* 462 F.2d 96, 103 (1972); *Birch* v. *United States,* 451 F.2d 165, 167 (1971); *United States* v. *Synnes,* 438 F.2d 764, 773 (1971); *Turley* v. *Wyrick,* 415 F.Supp. 87, 88 (1976); *Klein* v. *Murtagh,* 355 N.Y.S.2d 622, 626, 44 A.D.2d 465 (1974); *State* v. *Fletcher,* 26 Ohio St.2d 551, 271 N.E.2d 567, 569 (1971), cert. den. 404 U.S. 1024, 92 S.Ct. 699, 30 L.Ed.2d 675; *Breedlove* v. *State* (Tex. Cr. App.), 470 S.W.2d 880, 882 (1971), cert. den. 405 U.S. 1074, 92 S.Ct. 1512, 31 L.Ed.2d 808; *State ex rel. Cullen* v. *Ceci,* 485 Wis.2d 432, 173 N.W.2d 175, 187 (1970); *Bankston* v. *State* (Miss.), 236 So.2d 757, 760 (1970).

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Reference is made to the decision of Saden, J., in *State* v. *Tiche,* 33 Conn. Sup. 51, 360 A.2d 135. In that case, in which the issue of double jeopardy was raised, is the same situation existing here; transaction and events were the same as those in the instant case and there having been a previous conviction in the federal court.

"Nevertheless, the law in the area of successive federal-state prosecutions for the same kind of offense is clear. The doctrine of dual sovereignty allows successive federal-state prosecutions for the same offense. Abbate v. United States, 359 U.S. 187, 79 S.Ct. 666, 3 L.Ed.2d 729; Bartkus v. Illinois, supra; and United States v. Lanza, 260 U.S. 377, 43 S.Ct. 141, 67 L.Ed. 314. The court in Lanza stated (p. 382, 43 S.Ct. p. 142): 'We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject-matter within the same territory. . . . Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other.' In Bartkus, the petitioner was acquitted of robbery charges in a federal court and retried and convicted on that same robbery charge and the same evidence by a state court. The court, citing a large body of impressive precedent which showed that courts had for years refused to bar a second trial for the same offense, even when there had been a prior trial by another government, reaffirmed the dual sovereignty doctrine and proclaimed reprosecution by a state government after trial by the federal government not to be in violation of the double jeopardy provisions of the United States constitution.

"Cases such as Ashe v. Swenson, supra, n.1; Waller v. Florida, 397 U.S. 387, 90 S.Ct. 1184, 25 L.Ed2d 435; and Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707, which followed Bartkus, were thought by some to have

impugned the doctrine of dual sovereignty, but all of them involved successive state court prosecutions in the same state, and subsequent cases do not view them as rejecting the concept of dual sovereignty. Both the federal courts (United States v. Ackerson, 502 F.2d 300, 302 [8th Cir.]; United States v. Delay, 500 F.2d 1360, 1362 [8th Cir.]; United States v. Hayles, 492 F.2d 125, 126 [5th Cir.]; United States v. Smaldone, 485 F.2d 1333 [10th Cir.]; Martin v. Rose, 481 F.2d 658, 659 [6th Cir.], cert. denied, 414 U.S. 876, 94 S.Ct. 86, 38 L.Ed.2d 121; United States v. Jackson, 470 F.2d 684, 689 [5th Cir.]; United States v. Barone, 467 F.2d 247, 250 [2d Cir.]; United States v. Crosson, 462 F.2d 96, 103 [9th Cir.]; and the state courts (Bell v. State, 22 Md.App. 496, 510, 323 A.2d 677, cert. denied, 421 U.S. 1003, 95 S.Ct. 2405, 44 L.Ed.2d 672; State v. Turley, 518 S.W.2d 207, 210 [Mo. App.], cert. denied, 421 U.S. 966, 95 S.Ct. 1956, 44 L.Ed.2d 454; State v. Fletcher, 26 Ohio St. 2d 221, 271 N.E.2d 567, cert. denied, 404 U.S. 1024, 92 S.Ct. 699, 30 L.Ed.2d 675; Commonwealth v. Mills, 447 Pa. 163, 286 A.2d 638) have made this manifest. In addition, the United States Supreme Court has denied certiorari in all of the subsequent cases which have sought to reverse the dual sovereignty concept, e.g., Martin v. Rose, supra.

"Bartkus v. Illinois, 359 U.S. 121, 79 S.Ct. 676, 3 L.Ed.2d 684, is still the law and successive prosecutions by the federal and state governments for the same offense do not constitute double jeopardy. Commonwealth v. Mills, supra. Thus, even if we are dealing here with the same offense, the State of Connecticut is not barred from pursuing its rights to try the defendant." State v. Tiche, ante, at 136-7.

The defendant's motion to dismiss is denied.

Irving Levine, J.

Filed December 21, 1977.

Appendix "E"

(United States Constitution)

UNITED STATES CONSTITUTION

AMENDMENT [V.]

Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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(United States Constitution)

UNITED STATES CONSTITUTION
AMENDMENT XIV.

§ 1. *Citizenship rights not to be abridged by states*

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.